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No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND EDMUND B. LEWIS, JR.,

Petitioners,

VS.

NABISCO BRANDS, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VIAL, HAMILTON, KOCH & KNOX
BRUCE W. BOWMAN, JR.
(Counsel of Record)
ROMAN J. KUPCHYNSKY, II
1500 First RepublicBank Center
Tower II
Dallas, Texas 75201
(214) 922-9393

Attorneys For Petitioners

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36 pp

QUESTIONS PRESENTED

WHETHER NABISCO'S SELF TENDER OFFER FOR THE $3.50 CUMULATIVE PREFERRED STOCK VIOLATED NABISCO'S CERTIFICATE OF INCORPORATION AND THE SECURITIES EXCHANGE ACT OF 1934 AND THE SECURITIES ACT OF 1933.

WHETHER THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLIED THE TWO YEAR STATUTE OF LIMITATIONS TO PETITIONERS' CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AND VIOLATIONS OF SECTIONS 10, 13(e) AND 14(e) OF THE SECURITIES EXCHANGE ACT OF 1934 AND THE RULES PROMULGATED THEREUNDER.

WHETHER THE DISTRICT COURT ERRED WHEN IT GRANTED, AND THE FIFTH CIRCUIT ERRED WHEN IT AFFIRMED THE DISTRICT COURT'S, DIRECTED VERDICT ON PETITIONERS' RACKETEER INFLUENCE AND CORRUPT ORGANIZATIONS ACT ("RICO") CAUSE OF ACTION.

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TABLE OF ABBREVIATIONS

For the convenience of the Court, the following abbreviations will be used in Petitioners' Petition for Writ of Certiorari:

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FRANK D. BUNTON, CERF HIRSCH,
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Petitioners[1]

VS.

NABISCO BRANDS, INC.

Respondent[2]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK D. BUNTON, CERF HIRSCH, JAN HIRSCH VAN HORN, JOE CORDILL, MRS. JOHN MEREDITH and EDMUND B. LEWIS, JR., respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The Opinions of the Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Texas, Tyler Division, have not been reported. The opinions are reprinted in the Appendix attached hereto.

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[1] Petitioners are: Frank D. Bunton, Cerf Hirsch, Jan Hirsch Van Horn, Joe Cordill, Mrs. John Meredith and Edmund B. Lewis, Jr.

[2] Respondent is: Nabisco Brands, Inc., a Delaware corporation that is a wholly owned subsidiary of R. J. Reynolds, Inc.

JURISDICTION

The petitioners brought this suit in the Eastern District of Texas, Tyler Division claiming *inter alia* violations of the Securities Exchange Act of 1934, 15 U.S.C. Sections 78m(e), 78(n)(e) and Section 78j and Rule 10b-5, Rule 14(d) and 14(e) and Rule 13(_) and 13(e)-3 and Section 22 of the Securities Act of 1933. On June 5, 1986, the District Court entered judgment for Respondent. *See* Appendix.

On Petitioners' appeal to the United States Court of Appeals for the Fifth Circuit, the Fifth Circuit, on April 13, 1987, affirmed without opinion the District Court's judgment. *See* Appendix. No petition for rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1), 1257(3), and 2101.

STATUTES INVOLVED

15 U.S.C. Section 78j, 78m(e) and 78n(e) (1963); 18 U.S.C. Sections 1961-1964 (1972); TEX. BUS. COMM. CODE Section 27.01 (Vernon's 1985); TEX. CIV. PRAC. & REM. CODE Sections 16.004 and 16.051 (Vernon 1986); TEX. REV. CIV. STAT. ANN. Art. 5526 (Vernon's Supp. 1979); TEX. REV. CIV. STAT. ANN. Art. 5527(1) (Vernon's Supp. 1979); and TEX. REV. CIV. STAT. ANN. Art. 5529 (Vernon's Supp. 1979).

STATEMENT OF THE CASE

Petitioners were preferred shareholders of Nabisco Brands, Inc. ("Nabisco"). On August 15, 1985, they instituted an action against Nabisco alleging that Nabisco by and through its directors and officers used a self tender offer in a manipulative, fraudulent and deceptive manner in order to redeem and cancel the Nabisco $3.50 Cumulative Preferred Stock. As a result, Nabisco breached its fiduciary duty to Petitioners and breached its contract, as set forth in its Certificate of Incorporation, as amended, with Petitioners (R. 9) by utilizing a self tender offer of $50.00 per share instead of paying the redemption price of

$100.00 per share in order to retire the $3.50 Cumulative Preferred Stock. (TR. 106). The purpose and effect of Nabisco's self tender offer was a defacto redemption of the $3.50 Cumulative Preferred Stock.

In order to assist the Court in understanding this Petition for Writ of Certiorari, a short review of the history of the $3.50 Cumulative Preferred of Nabisco Brands, Inc. is important. In 1929, Standard Brands, Inc. ("Standard Brands") was incorporated under the laws of the State of Delaware and had outstanding a small issue of $7.00 Cumulative Preferred Stock listed on the New York Stock Exchange. (TR. 6). The preferred stock was redeemable in whole or in part on thirty days notice at $120.00 per share. Due to the financial conditions of the time, on or about June 1, 1937, management of Standard Brands redeemed and cancelled all outstanding shares of the $7.00 Cumulative Preferred at $120.00 per share. (TR. 67). Management authorized a new issue of $4.50 Cumulative Preferred Stock redeemable at $110.00 and listed such stock on the New York Stock Exchange. In 1946, Standard Brands redeemed all the outstanding shares of the $4.50 Cumulative Preferred at the stated redemption price of $110.00 a share and replaced it with the current $3.50 Cumulative Preferred which is the basis of this suit. (TR. 8). The $3.50 Cumulative Preferred Stock was redeemable at $100.00 per share.

On July 1, 1981, the shareholders of Standard Brands met in New York City to vote on a proposed merger with Nabisco, (TR. 9). One condition for the approval of the combination with Nabisco was that the new Nabisco $3.50 Cumulative Preferred Stock would have the same preference, special rights and powers as the Standard Brands $3.50 Cumulative Preferred Stock. Based on the representation by Nabisco that these conditions would be met prior to the combination of Standard Brands and Nabisco, the combination was approved by the shareholders and became effective on July 6, 1981, with both the common and preferred stock of Nabisco being listed on the New York Stock Exchange on that date. (TR. 114-115). Purchasers of the new

Nabisco $3.50 Cumulative Preferred Stock knew the history of the prior preferred stock redemptions and the logical corollary that Nabisco would probably redeem the preferred stock in the future. (TR. 68). On or about May 20, 1983, rather than redeeming at $100.00 per share, Nabisco sought to retire all of the $3.50 Cumulative Preferred Stock by a self tender offer of $50.00 per share. (TR. 126). The tender offer was extended by Nabisco until August 18, 1983. This action saved Nabisco $50.00 per share, and accomplished the same accounting treatment for the stock purchaser, but cost the preferred shareholder $50.00 per share. In order to force acceptance of the tender, Nabisco advised its preferred shareholders in the tender offer material that it would apply for delisting of the $3.50 Cumulative Preferred from the New York Stock Exchange upon completion of the tender offer; and, that it had no present intention to ever pay the $100.00 per share redemption price. (TR. 123-126).

At the time of the tender offer the $3.50 Cumulative Preferred stock was trading at approximately $42.00 per share. Under the threat of losing their market and the value of the $3.50 Cumulative Preferred stock, the Petitioners and most of the other preferred shareholders tendered their $3.50 Cumulative Preferred to Nabisco. The Petitioners however, advised Nabisco that said tender was under protest, and as a result of the duress that Nabisco exerted on the Petitioners. (TR. 121). After completion of the tender offer by Nabisco, the stock was in fact delisted by the New York Stock Exchange and the only market available to the shareholders of the $3.50 Cumulative Preferred was and is today the price Nabisco elects to pay the few remaining shareholders. (TR. 132).

In order to recover the additional $50.00 per share, Petitioners filed suit against Nabisco in the United States District Court for the Eastern District of Texas, Tyler Division. The jury, after being instructed by the District Court on the applicable Texas statute of limitations, found that Petitioners' causes of action for

fraud, breach of fiduciary duty and various securities law violations were not brought within two years from the date Petitioners first knew or should have known of the violation of their rights and, thus were barred by the alleged applicable statute of limitations. On June 5, 1986, the District Court entered judgment for Nabisco.

The case was appealed to the United States Court of Appeals for the Fifth Circuit. After oral arguments before the Fifth Circuit Court of Appeals, the Fifth Circuit Court of Appeals affirmed the District Court's judgment without opinion.

REASONS FOR GRANTING WRIT

I.

NABISCO'S TENDER OFFER FOR THE PETITIONERS' $3.50 CUMULATIVE PREFERRED STOCK VIOLATED THE RIGHTS OF THE $3.50 CUMULATIVE PREFERRED SHAREHOLDERS UNDER NABISCO'S CERTIFICATE OF INCORPORATION AND THE SECURITIES EXCHANGE ACT OF 1934 AND THE SECURITIES ACT OF 1933

The issue regarding Nabisco's self tender/defacto redemption presents this Court with a case that Petitioners believe is one of first impression and importance for this Court, as well as, for all jurisdictions. *Lehman* v. *Lycoming County Children's Services*, 458 U.S. 502, 507 (1982). *Williams* v. *Lee*, 358 U.S. 217 (1959); *Rice* v. *Sioux City Memorial Park Cemetary*, 349 U.S. 70 (1955).

The issue is whether Nabisco's self tender offer of $50.00 for Petitioners' $3.50 Cumulative Preferred stock, redeemable at $100.00 per share, violated as a matter of law, the rights of the $3.50 Cumulative Preferred shareholders pursuant to Nabisco's Certificate of Incorporation; and as a result, violated the Securities Exchange Act of 1934 and the Securities Act of 1933. Petitioners assert that Nabisco did not have the legal right to use

a self tender offer as a defacto redemption in order to evade the redemption price of $100.00 per share for the $3.50 Cumulative Preferred. (TR. 121).

As the Court is aware, historically, companies such as Nabisco, have used preferred stock to "borrow" capital from the public in order to finance the company's business. In order to understand the enormity of the use of preferred stock by corporations, one only has to look at the New York Stock Exchange to see companies like General Motors, Aluminum Corporation of America, Colgate-Palmolive, Control Data, and DuPont as a few examples of the wide spread use of identical preferred stock as a financing mechanism. In the United States, corporations have raised billions of dollars through the issuance of millions of shares of preferred stock to the general public.

In 1929 Standard Brands was incorporated under the laws of the State of Delaware, and had outstanding, in addition to its common shares, a small issue of $7.00 Cumulative Preferred stock listed on the New York Stock Exchange. The preferred stock had a preference as to assets and dividends and was redeemable at $120.00 a share. (TR. 6). In an environment of declining interest rates, Standard Brands management redeemed all outstanding preferred shares in June 1937, for $120.00 a share. (TR. 6). Immediately thereafter, Standard Brands issued a new $4.50 Cumulative Preferred stock which was redeemable at $110.00 a share and listed such stock on the New York Exchange. In 1946, with interest rates declining, Standard Brands again redeemed the $4.50 Cumulative Preferred stock at $110.00 per share. (TR. 7). After redeeming the $4.50 Cumulative Preferred, Standard Brands issued a $3.50 Cumulative Preferred which is the basis for this litigation. The redemption price of the $3.50 Cumulative Preferred stock was $100.00 per share. However, in 1946 when the $3.50 Cumulative Preferred was issued, the issue was difficult to sell and therefore, Standard Brands in order to reassure its investors "sweetened the offering" by amending its Certificate of Incorporation to include several

new provisions. (TR. 8). The following pertinent provisions were added to the Standard Brands Certificate of Incorporation:

> Without obtaining, *after written notice to all holders of [$3.50 Cumulative]* Preferred Stock, the affirmative approval by vote or written consent of the holders of a majority of the shares of Preferred Stock outstanding as of a record date not more than six months prior thereto, the Corporation shall not (a) alter or amend any of the preferences, special rights or powers of the Preferred Stock so as to affect the Preferred Stock adversely . . . (Emphasis added). (R. 83-84).
>
> The Corporation shall not be entitled to decrease the amount which any class or series of Preferred Stock shall be entitled to receive as dividends or upon distribution of assets in preference to any other class *or decrease the redemption price of such class or series unless the holders of all Preferred Stock of such class or series so affected adversely shall consent thereto.* (Emphasis added). (R. 83-84).
>
> The Corporation reserves the right to increase or decrease its authorized capital stock, or any class or series thereof, or to reclassify the same, and to amend, alter, change or repeal any provision contained in the Certificate of Incorporation under which the Corporation is organized or in any amendment thereto, in the manner now or hereafter prescribed by law, and all rights conferred upon stockholders in said Certificate of Incorporation or any amendment thereto are granted subject to this reservation; *provided, however, that the Corporation shall not decrease the amounts which any class or series of Preferred Stock shall be entitled to receive as dividends or upon a distribution of assets in preference to any other class, or decrease the redemption price of such class or series, unless the holders of all the Preferred Stock of such class or series so affected adversely shall consent thereto.* (Emphasis added). (R. 83-84).

In March 1981 Standard Brands purchased an additional 5,310 shares at $35.00 a share. Shortly, thereafter, it was announced that Standard Brands and Nabisco would merge. On July 1, 1981, a special meeting of the shareholders of Standard

Brands was held in New York City in order to vote on the proposed merger with Nabisco. (TR. 10). A condition for the approval of the combination with Nabisco was that the new Nabisco $3.50 Cumulative Preferred Stock would have the same preferences, special rights and powers as the Standard Brands $3.50 Cumulative Preferred Stock. Based on the representations that these conditions would be met prior to the combination of Standard Brands and Nabisco, the combination was approved by the preferred shareholders and became effective in July 6, 1981, with both the common and the preferred stock of Nabisco being listed on the New York Stock Exchange. As a result, up to this point in time, the Petitioners and purchasers of new Nabisco $3.50 Cumulative Preferred Stock knew the history of the redemption of the prior preferred stock and the logical corollary followed that Nabisco would probably redeem the $3.50 Cumulative Preferred Stock in the future. (TR. 16).

Nabisco's annual meeting of shareholders was held in Boston, Massachusetts on Thursday, May 5, 1981 with 99.85% of all preferred shares represented at the meeting. The $50.00 tender offer had been approved in April, 1981 by the board of directors just prior to the meeting but was not discussed at this meeting with the preferred shareholders. (TR. 112-118). Thereafter, on or about May 20, 1983, after very little research, the Nabisco Board of Directors approved and announced that Nabisco would self-tender for all of its $3.50 Cumulative Preferred Stock at $50.00 per share. (TR. 104, 106-108). Nabisco stated that it wanted to receive all of the outstanding $3.50 Cumulative Preferred Stock pursuant to the tender offer. (TR. 126). In its tender offer material Nabisco also advised its preferred shareholders that Nabisco would apply for delisting of the $3.50 Cumulative Preferred Stock from the New York Stock Exchange upon completion of the tender offer and that it had no present intention to ever pay the $100.00 per share redemption price. In order to induce the preferred shareholders into tendering their stock, Nabisco placed in its tender offer the following coercive warning:

> Upon completion of the Offer, however, the Company intends to apply for delisting of such stock from trading on the New York Stock Exchange and the termination of registration of such stock under the Securities Exchange Act of 1934. *The delisting could adversely affect the liquidity or future market value of the shares of the $3.50 Preferred Stock not tendered.* (Emphasis added). (R. 73).

Petitioners, as a result, were forced to choose between selling the preferred stock at $50.00 based on the information provided by Nabisco or, retaining the stock, which would be materially and adversely affected by the delisting of the $3.50 Cumulative Preferred Stock from the New York Stock Exchange. (TR. 121). Therefore, most of the Petitioners based on the information set forth in Nabisco's tender offer material, tendered all or a portion of their shares of $3.50 Cumulative Preferred to Nabisco and advised Nabisco that the said tender was under protest because of duress exerted by Nabisco on Petitioners. Thereafter, on or about August 15, 1983 Nabisco completed the tender offer and the $3.50 Cumulative Preferred stock was delisted from the New York Stock Exchange.

It is clear that Nabisco was attempting to receive or retire all the $3.50 Cumulative Preferred stock and to coerce the shareholders into tendering the stock in violation of Nabisco's Certificate of Incorporation. (TR. 124-126). Nabisco's officers and directors admitted at trial that Nabisco wanted to retire all of its $3.50 Cumulative Preferred Stock. They further admitted that Nabisco's proxy materials were misleading since Nabisco did not have to apply for delisting from the New York Stock Exchange. (TR. 136, 159). In addition, Nabisco failed to state in the proxy materials that Nabisco would continue to pay dividends to the $3.50 Cumulative Preferred shareholders who did not tender their shares. (R-73).

In addition, Nabisco's self tender offer was a coercive two-tiered tender offer since after the completion of the tender offer, the preferred stock had no market and Nabisco was the only purchaser of the stock at a price substantially lower than $50.00 per share. (TR. 122). Further, the threat of delisting and actual

delisting was a violation of the shareholders contract with Nabisco. The delisting of the preferred stock adversely affected the holders of the same by destroying its liquidity through the removal of the stock from the public market on which it traded. (TR. 121). Moreover, Nabisco made a large profit on the transaction to the exclusion and detriment of the preferred shareholders. Nabisco's general counsel however stated that the only benefit that Nabisco received from the self tender was that it did away with the administration of the preferred stock. (TR. 109). Nabisco's Secretary later admitted that Nabisco carried the $3.50 Cumulative Preferred stock on its balance sheet at $100.00 per share and only paid the preferred shareholders $50.00 per share. Therefore, Nabisco realized a profit of over six million dollars on the self tender/defacto redemption of the $3.50 Cumulative Preferred Stock. (TR. 169).

As a result, Nabisco's use of a self tender was a defacto redemption and violated its contract with Petitioners by adversely affecting the $3.50 Cumulative Preferred Stock without obtaining a written vote of the majority of the $3.50 Cumulative Preferred shareholders, as set forth in Nabisco's Certificate of Incorporation which states:

> The Corporation shall not . . . *decrease the redemption price of such class or series unless the holders of all Preferred Stock of such class or series so affected adversely shall consent thereto.* (Emphasis added). (R. 83-84).

Further, although "redemption" is not defined in the Certificate of Incorporation of Nabisco, the ordinary meaning of the term "redemption" is to repurchase. See *Webster's New College Dictionary,* 1979, page 960. Petitioners do agree that Nabisco had the legal right to purchase its own shares; however, the right of a corporation to purchase its own stock is subject to the condition that the purchase be made in good faith and without prejudice to the rights of the other shareholders. *Fletcher Cyc. Corp.* Section 2854 (Perm. Ed.) Furthermore, the preferred shareholder is entitled to insist upon performance according to

the terms of his contract with the corporation and the company cannot compel a surrender except in strict compliance with the terms of the contract. *Sterling* v. *H. F. Watson, Co.*, 297 A 290 (Pa. 1913). Therefore, the use of the self tender offer by Nabisco to keep from paying the full $100.00 redemption price violated the Petitioners' rights pursuant to Nabisco's Certificate of Incorporation.

Consequently, to allow the decisions of the District Court and Fifth Circuit to stand will allow corporations to issue preferred stock and raise capital from the general public without having to comply at a later date with the corporation's Certificate of Incorporation, on which such shareholders materially relied upon as the statement of their rights, preferences and power with respect to such security. These decisions also condone a corporation's wanton breach of its contracts with its shareholders and disguise said breach as a "benefit" to the shareholders without being accountable to the shareholders. Moreover, such decisions allow a corporation to profit at the expense of its own shareholders. Finally these decisions strike a forceful blow against the strong public policy of protecting the investing public from fraud and deception committed in securities transactions.

II.

THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLIED THE TWO YEAR STATUTE OF LIMITATIONS TO PETITIONERS' CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AND VIOLATIONS OF SECTIONS 10, 13(e) AND 14(e) OF SECURITIES EXCHANGE ACT OF 1934 AND THE RULES PROMULGATED THEREUNDER.

A corporation through its officers and directors owes its shareholders the utmost trust and fiduciary duty. *Hughes* v. *Houston Northwest Medical Center*, 680 S.W.2d 838 (Tex. App. Houston [1st Dist.] 1984, writ ref'd n.r.e.), cert. denied, 106 S. Ct. 571 (1984); *Gearhart Industries, Inc.* v. *Smith Intern., Inc.*, 741 F.2d 707 (5th Cir. 1984). Because Petitioners were shareholders of $3.50 Cumulative Preferred stock in Nabisco they were owed a fiduciary duty of trust by the officers and directors of Nabisco.

Since there are no specific federal limitations for actions based on breaches of fiduciary duty, the federal courts have looked to the applicable state statutes of limitations relating to the cause of action. *See Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938); *McNeal* v. *Paine Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979). The Texas Civil Practice and Remedies Code, Section 16.051, which is a recent codification of TEX. REV. CIV. STAT. Art. 5529, states:

> Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.

Accordingly, since there is no specific Texas limitations period for actions based on breach of fiduciary duty, the applicable limitations period is four (4) years pursuant to Section 16.051 of the Texas Civil Practice and Remedies Code. In *Peek* v. *Berry*, 143 Tex. 294, 184 S.W.2d 272, 275 (1944), citing TEX. REV. CIV. STAT. Art. 5529 (now codefied as TEX. CIV. PRAC & REM. CODE Section 16.051), the Texas Supreme Court stated:

> [t]he period of limitations applicable to suits to enforce a trust, or arising out of a breach of trust, is ordinarily governed by the four years statute of limitation prescribed for actions other than for the recovery of real estate, for which no limitation is otherwise prescribed.

Further, in *Graham* v. *Turner*, 472 S.W.2d 831, 836 (Tex. Civ. App. — Waco 1971, no writ), a case where a 50% shareholder sued to enforce his interest in the corporation and for breach of fiduciary duties by the owner, the court in following *Yeaman* held:

> [In *Yeaman*,] a suit by minority shareholders against the corporation and officers to enforce their rights and for an accounting, . . . the Supreme Court held that the four year statute applies, because the relation of a corporation to its stockholders is that of a contractual relation, whereby the corporation acquires and holds the stockholder's investment under the express recognition of his right and for a specific purpose. *citing*, *Yeaman* v. *Galveston City Co.*, 167 S.W. 710 (Tex. 1914).

Therefore, Petitioners' suit against Nabisco for breach of its fiduciary duty to their $3.50 Cumulative Preferred stock is governed by the four (4) year limitations period in Section 16.051, not the two (2) year statute of limitations set forth in Article 5526.

In addition, the four (4) year statute of limitations, under Section 16.001 *et seq.* of the Texas Civil Practice and Remedies Code, applies to Petitioners' action alleging securities fraud and Rule 10b-5, 13(e) and 14(e) violations. The Fifth Circuit has held in *Bauman* v. *Centex Corp.*, 611 F. 2d 1115, 1116 (5th Cir. 1980), that the limitations period for a federal securities fraud cases filed in Texas is governed by Article 27.01 of the Texas Business and Commerce Code. *See also Coastal Distributing* v. *NGK Spark Plug Co.*, 779 F.2d 1033, 1038 (5th Cir. 1986). However, since TEX. BUS. & COMM. CODE Art. 27.01 has no limitations period, Texas courts have followed TEX. REV. CIV. STAT. Art. 5526.

Until 1979, TEX. REV. CIV. STAT. Art. 5526 was the controlling limitations provision in Texas for actions involving fraud. Article 5526 stated that the two (2) year statute of limitations was applicable for "actions for debt where the indebtedness is not evidenced by a writing." Article 5526, however, was amended on or about August, 1979, and the above-cited provision was deleted. Following the amendment of Article 5526, the applicable fraud provision was incorporated into the four (4) year statute of limitations, TEX. REV. CIV. STAT. Art. 5527(1) which stated: "All actions for debt must be prosecuted four years after the cause of action has accrued."

In September, 1985, all of the above-cited statutes were codified into the Texas Civil Practice and Remedies Code, Section 16.001 *et seq.* Specifically, Article 5527 was codified into Section 16.004 which now states:

> (a) A person must bring suit on the following actions not later than four years after the date the cause of action accrues . . .
>
> (3) debt

The District Court disagreed with Petitioners' position that the Texas statute of limitations for securities fraud was four (4) years and cited the Fifth Circuit case of *Coastal Distributing* v. *NGK Spark Plug Co.*, 779 F.2d 1033, 1038 (5th Cir. 1986), in support of its judgment.

Coastal Distributing, however, should not control in this case. In *Coastal Distributing*, the Fifth Circuit stated:

> Texas Courts have long applied the two year limitations period of Article 5526 to actions based on fraud. *Eg. Quinn* v. *Press*, 135 Tex. 60, 140 S.W. 2d 438 (1940); *Atomic Fuel Extraction Corp.* v. *Slick's Estate*, 386 S.W.2d 180 (Tex. Civ. App. — San Antonio 1964, writ ref'd n.r.e.).

Coastal Distributing, 770 F.2d at 1038.

The above statement by the Fifth Circuit Court is accurate only because the cases cited in the above quotation were decided prior to the amendment of Article 5526 in 1979, which at that time

provided for a two (2) year limitations period for an "action for debt."

However, the Fifth Circuit went on to further state in *Coastal Distributing:*

> Texas Courts after the 1979 have continued to apply the two year period of Article 5527 for actions based on fraud. *See Mooney* v. *Harlin,* 622 S.W.2d 83, 84 (Tex. 1981) (citing *Quinn and Ryan* v. *Collins,* 496 S.W.2d 205, 210 (Tex. Civ. App. — Tyler 1973, writ ref'd n.r.e.)); *See also Hays* v. *McNeice,* 641 S.W.2d 695 (Tex. App. Amarillo 1982, no writ); *Spellings* v. *Lawyers Title Ins. Corp.,* 644 S.W.2d 804 (Tex. App. — Corpus Christi 1982, writ ref'd n.r.e.).

Coastal Distributing, 779 F.2d at 1038.

Petitioners respectfully submit that the authorities cited in support of the above quotation do not support such holding. Several of the Texas cases cited by the Fifth Circuit were decided prior to the 1979 amendment of Article 5526. Further, the post-1979 Texas cases cited by *Coastal Distributing* tautologically relied, with respect to the two (2) year limitations question, upon case authority decided prior to the 1979 amendment of Article 5526. Moreover, the *Hays* case cited by the Fifth Circuit was a summary judgment case dealing with the sufficiency of Defendant's pleadings in order to withstand the Plaintiff's action for summary judgment. *See Hays* v. *McNeice,* 641 S.W.2d 695 (Tex. Civ. App. — Amarillo 1982, no writ). The *Spellings* case was a Texas Deceptive Trade Practices Act case and such Act provides for a two (2) year statute of limitations. *See Spellings* v. *Lawyers Title Ins. Corp.,* 644 S.W.2d 804, 807 (Tex. App. — Corpus Christi 1982, writ ref'd n.r.e.).

In addition, in the case of *Neely* v. *Bankers Trust Co.,* 757 F.2d 621, 632 (5th Cir. 1985), cited by the Fifth Circuit in *Coastal Distributing,* the cited authority addresses only the equitable estoppel issue in connection with the fraud cause of action. The *Bauman* v. *Centex Corp.,* 611 F.2d 1115 (5th Cir. 1980), also cited in *Coastal Distributing,* addressed the two year

limitations period under Article 5526; however, the authorities cited in *Bauman* are all pre-Article 5526 amendment cases and therefore, the authorities do not control the issues in this case. *See Bauman,* 611 F.2d at 1118.

In addition, the *Coastal Distributing* Court stated "that action for fraud may not be an action for debt." *citing, Quinn* and *Atomic Fuel, supra.*

However, Texas case law clearly states that fraud is an "action for debt." *Miller* v. *Kountze Corporate School Dist.,* 54 S.W.2d 344 (Tex. Comm'n App. 1932, opinion adopted); *Certain Feed Produce Corp.* v. *Bell,* 411 S.W.2d 695 (Tex. Civ. App. — Amarillo 1967) *aff'd* 422 S.W.2d 719 (Tex. 1968).

Therefore, the applicable statute of limitations for Petitioners' securities fraud cause of action under Section 10, 13(e) and 14(e) and the Rules promulgated thereunder is four years pursuant to TEX. CIV. PRAC. & REM. CODE, Section 16.004. As a result, the Fifth Circuit erred in affirming the District Court's ruling that the two year statute of limitations applied to Petitioners' securities fraud causes of action. Accordingly, to allow the District Court's and Fifth Circuit's decisions to stand totally disregards well settled Texas law.

A. The Applicable Statute of Limitations Begins To Accrue When a Legal Injury Results

Assuming arguendo that Texas Courts would apply the two year statute of limitations to actions for fraud, the applicable limitations period only begins to run when a legal injury results. *Bauman* v. *Centex Corp.,* 611 F.2d at 1118. *Atkins* v. *Crossland,* 417 S.W.2d 150 (Tex. 1967).

In *Bauman,* minority shareholders sued a corporation for breach of contract, state law fraud and securities violations. The *Bauman* case is analogous to this case, in that the defendant in *Bauman,* alleged that plaintiffs knew or should have known of the misrepresentation more than two years before the suit was filed. The court stated:

> [T]he general rule is that there can be no legal or actionable fraud unless the act *resulted in injury* to the person defrauded. *Travelers Ins. Co.* v. *Delta Airlines, Inc.*, 498 S.W.2d 443, 447 (Tex. Civ. App. 1973) (emphasis original) . . . Thus until the escrow agreement expired and the stock was lost, plaintiffs sustained no injury, and the misrepresentations had not become a legal injury. *Bauman*, 611 F.2d at 1119.

Prior to August 18, 1983, which was the date Nabisco's self tender offer expired, Nabisco had the right to decline to purchase any shares and could withdraw the tender offer pursuant to section (g) of the tender offer materials which states in pertinent part:

> (g) *Conditions to and Amendment of the Offer.* The Company may decline to purchase any shares of $3.50 Preferred Stock and may withdraw the Offer as to shares not then purchased or paid for, if before the time of purchase or payment there shall have occurred any of the following events which, in the Company's sole judgment, makes it inadvisable to proceed with such purchase or payment:
>
> (i) any government agency or other person shall have instituted or threatened any action or proceeding before any court or administrative agency: (a) which challenges the acquisition of shares pursuant to the offer or which otherwise relates in any manner to the offer; or (b) which materially adversely affects the Company;
>
> (ii) there shall have occurred any material adverse development in any existing action or proceeding with respect to the Company; or
>
> (iii) any state of war, national emergency, banking moratorium or suspension of payments by banks in the State of New York or the State of New Jersey shall have occurred, or any currency or exchange control laws or regulations or general suspension of trading or limitation of prices on the New York Stock Exchange shall have been imposed.
>
> The Company also reserves the right to amend the Offer by public announcement of any amendment.

(R. 73).

Furthermore, as is shown by the above last sentence, Nabisco could have increased the offer to the full redemption price of $100.00 or decreased the offer. Cerf Hirsch had protested the price to Nabisco prior to the expiration date. (TR. 20). Consequently, until the tender offer was actually completed, there was no damage incurred and no injury sustained, so limitations did not commence to run. See *Atkins* v. *Crossland*, 417 S.W.2d 150 (Tex. 1967). Therefore, in this case statute of limitations did not begin to run until the tender offer expired on August 18, 1983.

Accordingly, Petitioners respectfully submit that the District Court and the Fifth Circuit erred in ruling that Petitioners' securities fraud and breach of fiduciary duty causes of action are barred by the two year statute of limitations.

III.

THE DISTRICT COURT ERRED WHEN IT GRANTED, AND THE FIFTH CIRCUIT ERRED IN AFFIRMING, THE DISTRICT COURT'S, DIRECTED VERDICT ON PETITIONERS' "RICO" CAUSE OF ACTION

At the close of Petitioners' case in chief, Nabisco moved for a directed verdict on Petitioners' Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1961-1964 ("RICO") cause of action. (TR. 144). The District Court after considering arguments from both parties' counsel, granted Nabisco's Motion For Directed Verdict on Petitioners' RICO cause of action. (TR. 147). On appeal, the Fifth Circuit affirmed the District Court's ruling.

On a motion for directed verdict, the court should consider all of the evidence in the light most favorable and with all reasonable inferences to the party opposing the motion. *Boeing Company* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). Motions for directed verdict should not be decided by which side has the better case. *Boeing*, 411 F.2d at 375.

Petitioners, however, sufficiently set forth facts to support their allegation that Nabisco's tender offer and scheme to

defraud the $3.50 Cumulative Preferred shareholders was a RICO violation. In support of Petitioners' contention, Petitioners introduced evidence setting forth the essential elements of a RICO violation. (TR. 104-112; 167-170). In particular, Petitioners properly set forth an "enterprise" engaged and/or affecting interstate commerce through the pattern of racketeering activity. (TR. 104-112). In addition, Petitioners properly evidenced a enterprise separate and distinct from the Defendant Nabisco. (TR. 104-105). Further, Petitioners evidenced an existing and on going organization and enterprise, independent from the alleged predicate offenses. (TR. 118). *U.S.* v. *Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980); *cert. denied*, 450 U.S. 912 (1981).

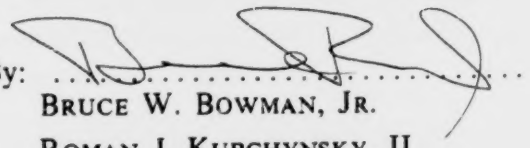
There is no distinction for "enterprise" purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba like structure that controls a secret criminal network. *U.S.* v. *Elliott*, 571 F.2d 880, 898 (5th Cir. 1978). Therefore, since Section 1961(4) of the RICO Act defines an "enterprise" as including "any individual partnerships, corporation, association, or other legal entity . . ." and Section 1962(c) prohibits "any person employed by or associated with any enterprise from committing the prescribed conduct." A "person" includes any individual or entity capable of holding a legal or beneficial interest in property." *See* 18 U.S.C. Section 1961(3) (1972). Consequently, considering the broad meaning of the term "enterprise" and the willingness of the federal courts to expand the scope of a RICO application, it is clear, that a corporation may be both a Defendant and an enterprise under RICO. *U.S.* v. *Turkette*, 452 U. S. 516, 587 (1981); *U.S.* v. *Hartley*, 678 F.2d 961, 968 (11th Cir. 1982).

Therefore, Petitioners presented sufficient evidence to the jury regarding Nabisco's violation of the RICO statute and the District Court should have submitted the RICO issue to the jury and the Fifth Circuit erred in affirming the District Court's judgment. (TR. 104-112; 118-120; 167-170).

CONCLUSION

Petitioners respectfully urge, for all reasons set forth above, that the judgments of the District Court for the Eastern District of Texas and Fifth Circuit Court of Appeals require a reversal by this Court. Accordingly, Petitioners request this Court to grant a Writ of Certiorari to review the judgments and opinions of the District Court for the Eastern District of Texas and Fifth Circuit Court of Appeals.

Respectfully submitted,



By: .....

BRUCE W. BOWMAN, JR.

ROMAN J. KUPCHYNSKY, II

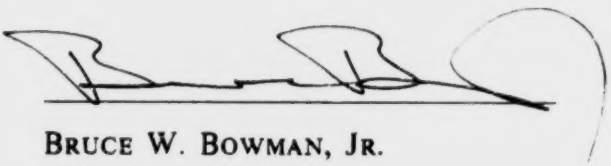
VIAL, HAMILTON, KOCH & KNOX
1500 First RepublicBank
Tower II
Dallas, Texas 5201
(214) 922-9393

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Bruce W. Bowman, Jr., do hereby certify that on the 10th day of July, 1987, I served, via prepaid first class mail, three (3) copies of the foregoing Petition for Writ of Certiorari on Counsel for Respondent, Burton Brody, Esq., Nabisco Brands, Inc., 625 Madison Avenue, New York, New York 10022. Further, on the 13th day of August, 1987, I served, via prepaid first class mail, three (3) additional copies of the same Petition for Writ of Certiorari on Counsel for Respondent, Burton Brody, Esq., Nabisco Brands, Inc., 625 Madison Avenue, New York, New York 10022.

I further certify that all parties required to be served have been served.



BRUCE W. BOWMAN, JR.
ROMAN J. KUPCHYNSKY

VIAL, HAMILTON, KOCH & KNOX
First RepublicBank Center
1500 Tower II
Dallas, Texas 75201-3890
Attorneys for Petitioners

APPENDIX

IN THE

United States District Court for the Eastern District of Texas Tyler Division

No. TY-85-353-CA

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND MR. EDMUND B. LEWIS, JR.,

Plaintiffs,

VS.

NABISCO BRANDS, INC.,

Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable William M. Steger, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of the Defendant Nabisco Brands, Inc., and against Plaintiffs, Frank D. Bunton, Cerf Hirsch, Jan Hirsh Van Horn, Joe Cordill, Mrs. John Meredith, and Mr. Edmund B. Lewis, Jr..

It is ORDERED and ADJUDGED that Defendant, Nabisco Brands, Inc., have judgment over and against Plaintiffs, Frank D. Bunton, Cerf Hirsch, Jan Hirsch Van Horn, Joe Cordill, Mrs. John Meredith, and Mr. Edmund B. Lewis, Jr., and that said Plaintiffs take nothing by virtue of their claims against Defendant. The Defendant, Nabisco Brands, Inc., shall recover of the Plaintiffs its costs of action.

SIGNED this 5th day of June, 1986.

/s/ WILLIAM M. STEGER
UNITED STATES DISTRICT JUDGE

IN THE

United States District Court for the Eastern District of Texas Tyler Division

No. TY-85-353-CA

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
MRS. JOHN MEREDITH AND MR. EDMUND B. LEWIS, JR.,

Plaintiffs,

VS.

NABISCO BRANDS, INC.,

Defendant.

MEMORANDUM IN SUPPORT OF JUDGMENT

On this day a letter from Plaintiff's counsel has been brought to the attention of the Court addressing a possible problem with the statute of limitations issue which the jury found for the Defendant. Plantiff's counsel correctly points out that in 1979 art. 5526 Tex. Rev. Civ. Stat. Ann. was amended and actions for debt where the indebtedness was not evidenced by a contract in writing was deleted from the article. Subsequently all actions for debt were included in the provision in the article providing for a four-year, instead of a two-year, statute of limitations. This change has recently been codified in §16.004 of the Civil Practice and Remedies Code. Plaintiff's counsel, therefore, asserts that the four year statute of limitations should be applied to the fraud issues and breach of fiduciary duty issue that were present in the above case when it was tried to a jury. In light of some recent Fifth Circuit opinions on the subject this Court cannot agree with Plaintiff's interpretation.

In *Coastal Distributing v. NGK Spark Plug Co.*, 779 F. 2d 1033 (5th Cir. 1986), the Fifth Circuit considered and recognized the amendments to the articles governing the statutes of

limitations in Texas and concluded that the two year statute still applied to action based on fraud. Specifically the Fifth Circuit said,

> Texas courts have long applied the two-year limitations period of Article 5526 to actions based on fraud. [citations omitted] . . . Texas Courts after the 1979 amendments have continued to apply the two-year period of Article 5526 to actions based on fraud. [citations omitted] . . . This Court, when applying Texas law, has acted similarly. [citations omitted] . . . 779 F. 2d at 1038.

Further in a more recent case, the Fifth Circuit has unequivocally held that the two-year statute of limitations applies to actions under 10b-5. *See* 15 U.S.C. 78j(b); *Corwin v. Marney, Orton Investments,* Slip No. 85-2401, April 30, 1986. In this opinion the Fifth Circuit stated that the Texas "fraud statute, Tex. Bus. & Com. Code Ann. §27.01 (Vernon 1968) does not contain a time limit within which suit must be brought, but the two-year period of Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon 1958) now codified in revised form at Tex. Civ. Prac. & Remedies Code Ann. §16.003 (Vernon Supp. 1986) is applied to actions based on fraud."

In light of the Fifth Circuit's recognition of the amendment to article 5526 and their continued application of the two-year statute of limitations for actions based on fraud, this Court believes the issue was correctly presented and answered by the jury.

Judgment shall be entered accordingly.

SIGNED this 5th day of June, 1986.

/s/ WILLIAM M. STEGER
UNITED STATES DISTRICT JUDGE

IN THE

United States Court of Appeals for the Fifth Circuit

No. 86-2515

FRANK D. BUNTON, CERF HIRSCH,
JAN HIRSCH VAN HORN, JOE CORDILL,
JOHN MEREDITH AND MRS. EDMUND B. LEWIS, JR.,

Plaintiffs-Appellants,

VERSUS

NABISCO BRANDS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas (TY-85-353-CA)

(April 13, 1987)

Before BROWN, REAVLEY and JOLLY, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.